Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1625

FRANK J. PATE, former Warden HERBERT BROWN, former Illinois Director of Public Safety and HOLLIS W. McKNIGHT, former Superintendent,

Petitioners,

vs.

CHARLES THOMAS,

Respondent,

ILLINOIS DEPARTMENT OF CORRECTIONS, ILLINOIS STATE PENITENTIARY, FRANK J. PATE, former Warden,

Petitioners,

vs.

LUTHER W. MILLER,

Respondent.

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,
JAMES B. ZAGEL,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 West Randolph Street (Suite 2200),
Chicago, Illinois 60601, (312) 793-2570,
Counsel for Petitioners.

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CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS

The initial consolidated opinion of the United States Court of Appeals, Seventh Circuit, in the present case is reported at 493 F. 2d 151 (7th Cir. 1974), and is attached hereto as Appendix A. The Court's denial of rehearing also resulted in an opinion which is reported at 493 F. 2d 163, and is attached hereto as Appendix B. The United States Supreme Court granted Certiorari on October 15, 1974, vacated the Appeal Court's judgment and remanded the case "for further consideration in light of *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S. Ct. 2963 (1974)." 419 U.S. 813, 95 S. Ct. 288, sub nom. *Cannon* v. *Thomas*, rehearing denied, 419 U.S.——, 95 S. Ct. 529. The United States Court of Appeals, Seventh Circuit, Opinion On Remand was issued on March 25, 1975, and is attached hereto as Appendix C.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued their Opinion On Remand in the present case on March 25, 1975. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In a lawsuit brought under the Civil Rights Act, 42 U.S.C. 1983, to remedy alleged state-enforced racial segregation in prison cell assignments, should the inmate-plaintiff carry a lesser burden of proof than is carried by ci-

vilian plainttiffs making similar allegations in school desegregation cases?

2. In a 42 U.S.C. 1983 action alleging unlawful racial segregation in prison, is it fundamentally unfair to shift the burden of proof to defendant state officials, after the inmate-plaintiff has merely established that there is an existing condition of separation of the races in individual cell assignments within admittedly integrated cell houses?

3. Did the plaintiffs'-respondents' Complaints allege an actual case or controversy under Article III of the Constitution with regard to the issue of racial segregation in prison cell assignments, even though the plaintiffs failed to allege that they had never requested permission to live in an integrated cell or that they had any desire to see whites and blacks cell together?

4. Did the Court below misconstrue this Court's decision in *Haines* v. *Kerner* as setting up a standard of procedural due process in prison disciplinary hearings?

5. Do the plaintiffs'-respondents' Complaints state a constitutional cause of action for denial of due process in 1963-'66 disciplinary incidents, according standards applicable at that time?

STATEMENT OF FACTS

Respondents, both inmates of the Illinois State Penitentiary, filed complaints for relief under 42 U.S.C. § 1983 in the United States District Court for the Northern District of Illinois in 1966 and 1969, alleging, among other things, racial segregation in cell assignments and denial of due process safeguards in prison disciplinary proceedings. The District Court after trial held for the defendant prison officials, finding that there was no racial discrimination or denial of due process. Plaintiffs appealed this decision to the Court of Appeals for the Seventh Circuit. The appeal was argued orally before the Court in October, 1972 and in January, 1974 the Court of Appeals rendered its 2 to 1 decision, holding that the burden of proof switches to the defendant in a case alleging unlawful racial segregation, once the plaintiff has shown a separation of the races within a cellhouse. The Court also found that plaintiff Thomas had properly alleged denial of due process safeguards mandated by *Miller* v. *Twomey*, 479 F. 2d 701 (7th Cir. 1973), which had been decided during the pendency of the appeal in the instant case and that these allegations should not have been dismissed. (see Appendix A). A timely Petition for Rehearing was denied on April 4, 1974. (see Appendix B).

A petition for Certiorari was subsequently filed with this Court by defendants and granted. On October 15, 1974, this Court vacated the judgment and remanded the case in light of *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S. Ct. 2963 (1974). On remand, the United States Court of Appeals, Seventh Circuit, reversed their earlier stand in applying the due process safeguards announced in *Miller*, supra, and determined that these standards should not retroactively

apply to the instant complaint. But the Court of Appeals still refused to dismiss the plaintiff's due process complaints, applying what they felt was the *Haines*[1] rationale; the Appeals Court continued to follow their previous decision that the burden of proof switches to the defendant in a case alleging unlawful racial segregation, once the plaintiff has merely shown a separation of the races within a cellhouse. (see Appendix C).

REASONS FOR GRANTING THE WRIT

A.

THERE IS NO JUSTIFICATION FOR ASSIGNING TO AN INMATE-PLAINTIFF WHO CLAIMS UNLAWFUL SEGREGATION IN CELL ASSIGNMENTS A BURDEN OF PROOF WHICH IS LESS THAN THE BURDEN IMPOSED BY THIS COURT ON PLAINTIFFS MAKING SIMILAR ALLEGATIONS IN SCHOOL DESEGREGATION CASES.

The Court of Appeals for the Seventh Circuit held in this case that the burden of proof in the trial of a racial segregation claim shifts to defendant prison officials when the plaintiff merely proves that a separation of the races exists in the prison housing units. The burden or presumption laid on defendants' shoulders was not said to have been created by any statute or subsequent to any judicially documented history of racial segregation in any part of the Illinois State Penitentiary. Nor was there any decisional authority cited by the Appeals Court suggesting the propriety of establishing a presumption against the defendants. Indeed, the Appeals Court conceded that, in the re-

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1. *Haines* v. *Kerner*, 404 U.S. 519 (1972).

cent school desegregation case it cited, *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 93 S. Ct. 2686 (1973), this Court set out a standard of proof for plaintiffs which required *more* than simply a showing of racial separation.

In *Keyes,* this Court held that in *de facto* segregation cases, those individuals challenging the school system must not only prove that segregative schooling exists, but also that it was brought about or maintained by *intentional* state actions. 413 U.S. at 208, 93 S. Ct. 2686. Although the record of governmental action in *Keyes* rather clearly showed a segregative purpose,[2] no such motivation or purpose has been demonstrated against the Illinois State Penitentiary. In this regard, the Court of Appeals shifted the burden of proof to the defendants based solely on the condition of some racial separation[3] with no finding that the separation had been purposefully initiated or intentionally maintained.

The Ninth Circuit, in *Soria* v. *Oxnard School District Board of Trustees,* 488 F. 2d 579 (1973), applied this Court's reasoning in *Keyes,* holding that before a system may be found to be unconstitutionally segregated there must be a determination whether the school board intentionally or purposefully segregated its system; a most recent application of this position may be found in the opinion of the U.S. District Court for Eastern Pennsyl-

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2. In that case the district court had determined that through various acts such as school construction policies, gerrymandering attendance zones, and excessive use of portable classrooms, that the school board had engaged in an unconstitutional policy of deliberate racial segregation.

3. The Court of Appeals shifted this burden, even in light of the facts on voluntary call assignments submitted to the Court.

vania, *Husbands* v. *Pennsylvania*, ——F. Supp. 2d——, 43 L. W. 2427. (3/31/75). There the court again addressed the question of *de facto* segregation in the public school system, and ruled that in the absence of a showing of segregative purpose or motivation attributable to the state, that the segregation is constitutional.

The Court of Appeals here sought to explain the difference between its formulation of defendants' burden and the accepted standard in school segregation cases by pointing to two assumed distinctions between school and prison segregation cases. The first assumption, that there is a "higher probability" in prison cases that segregation is a result of intentional state policies, is unsupported by any fact regarding operations in the Illinois State Penitentiary; it conflicts head-on with the facts on voluntary cell assignments submitted to the Court of Appeals and the District Court by defendants and their counsel. The second assumption, concerning prisoners' difficulty in obtaining and presenting evidence of racial segregation, completely ignores the fact that these plaintiff inmates and any others that go to trial in federal district courts *have* appointed counsel who are free to use the entire discovery machinery of the Federal Rules of Civil Procedure. Through requests for documents and scheduling of depositions, inmates' attorneys are and have been quite able to discover the facts relevant to the cause of any alleged separation of the races at an Illinois institution. State prison officials are not immune to reasonable discovery requests under the Rules, and the record below discloses no frustrated discovery attempts. See, F. R. Civ. P., Rules 26, 30, 31, 33, 34 and 37. Thus, there is no rational reason for departing from the standard set up in *Keyes*.

The general guidelines established in *Keyes* for the allocation of the burden of proof are public policy and fairness. (at p. 2698) A policy well recognized by this Court is that of deference to prison officials in administrative and security matters. *Johnson* v. *Avery*, 393 U.S. 483, 89 S. Ct. 747 (1969); *Lee* v. *Washington*, 390 U.S. 333, 88 S. Ct. 994 (1968). This recognition of the expertise of prison officials and the exigencies of institutional life should be considered in allocating the burden of proof, and inmate plaintiffs should be required to prove more than the mere existence of any form or amount of racial separation.

If the majority of the Appeals Court, in writing the Jan. 10, 1974, Opinion, was concerned about the "paucity of evidence" in the record of the present plaintiffs' case at trial, there was another, less drastic, more realistic conclusion which the Court might have drawn to justify a remand for new trial of the cell-segregation claim. Where a prisoner's appointed counsel has not made use of discovery tools and has presented little evidence of any kind at trial, a court may conclude that plaintiffs had not been "afforded a fair opportunity to present their case" as to some allegation. This might justify a remand with instructions to have counsel make discovery, re-open his case and pursue it with that minimal level of competence which the court presumes that he possesses. See *U.S. ex rel., Countee Williams* v. *Twomey*, Slip Opinion No. 74-1071 (7th Cir. 1975); cf. *Thomas*, 493 F. 2d at 157. Such an order could well have the effect of developing the evidence necessary for a judicial determination as to whether prison officials practiced intentional racial segregation, without radically and unfairly altering the burden of proof.

B.

THE LOWER FEDERAL COURTS HAVE NOT BEEN CONSISTENTLY ALLOCATING THE BURDEN OF PROOF IN RACIAL DISCRIMINATION CASES INVOLVING STATE OR LOCAL DEFENDANTS.

The burden of proof in other types of racial discrimination cases brought under the Civil Rights Act has not been consistently allocated in the federal courts. Some Circuit Courts of Appeals held that the burden of proof rests solely with the plaintiff. *Arkansas Education Association* v. *Bd. of Education of Portland, Arkansas School District*, 446 F. 2d 763 (8th Cir. 1971); *Beaumont* v. *Morgan*, 427 F. 2d 667 (1st Cir. 1970). Other circuits have held that the plaintiff need only establish a minimal prima facie case; then the burden shifts to the defendant. *Martin* v. *Duffie*, 463 F. 2d 464 (10th Cir. 1972); *Hodgson* v. *First Federal Savings & Loan Ass'n. of Broward Co., Fla.*, 455 F. 2d 818 (5th Cir. 1972); *Baker* v. *City of St. Petersburg*, 400 F. 2d 294 (8th Cir. 1968). The Court of Appeals below has, of course, defined a prima facie case for the present plaintiffs-respondents in such terms as to require almost nothing from them. Guidance by this Court is necessary to properly determine the allocation of the burden of proof in the important area of prisoners' civil rights complaints based upon claims of racial discrimination within the prison. This is so particularly because of the unique situation that is presented. Racial separation here, according to the Record, is only partial and largely a result of inmate work assignments and housing requests. Inmates eat and work together and share the same recreational facilities, cell houses and sanitary facilities.

C.

THE ALLOCATION OF THE BURDEN OF PROOF MADE BY THE COURT OF APPEALS IS FUNDAMENTALLY UNFAIR TO THE DEFENDANTS.

The new allocation of burden of proof, which the Court of Appeals formulated for prison racial segregation cases and which it used as a basis for overturning the judgment of the District Court, is grossly unfair to defendant state officials.

The Court recognized that plaintiffs, working through their appointed counsel, managed to prove at trial *only* that there was considerable separation of the races in the celling pattern at the penitentiary where they were incarcerated. All the remaining questions crucial to a determination of the existence of state imposed racial segregation were not addressed by the plaintiff in presenting their evidence. Nor were these questions entirely resolved by the defendant's evidence. However, the Court of Appeals decided that proof of merely some racial separation was sufficient in the prison situation to shift the burden of proof to the defendants on the whole issue of state responsibility for the separation.

Assignment of almost the entire burden of proof to defendant state officials in this fashion really amounted to establishing a rebuttable presumption that they are guilty of unlawful racial segregation whenever very little integration of the races is found in a prison, even where a lopsided majority of the inmates are of one race—as in the present case, the black race. Now, in the 7th Circuit, a simple allegation by any inmate that the races fail to mix in some part of the Illinois correctional complex will force the State to go to trial and present a complete his-

tory and justification of their inmate management services there. The presumption with its corresponding burden can be triggered repeatedly, as long as there are members of more than one race incarcerated.

D.

THE RESPONDENTS' ALLEGATIONS OF RACIAL SEGREGATION IN PRISON CELL ASSIGNMENTS PRESENTED NO CASE OR CONTROVERSY AS REQUIRED BY ARTICLE THREE OF THE UNITED STATES CONSTITUTION.

When a large class of people is under the direct control of a state agency as in state prisons there is often a difficult question of standing raised in civil rights complaints. While actions of the state may not directly affect all individuals, plaintiffs may perceive a *potential* for such direct injury. In the present case, the plaintiffs alleged and presented some evidence tending to show that initial cell assignments resulted in members of different races celling separately. However, plaintiff failed to allege that they ever requested to be housed with a inmate of another race or that they suffered any injury because members of different races generally lived in different cells.

This court dealt with a similar problem in *O'Shea* v. *Littleton*, No. 72-953, 414 U.S. 488, 14 Crim. L. Rptr. 3085, 3 (1974).

In the *O'Shea* case, a 42 U.S.C. 1983, 1985 action, racial discrimination against black civil rights activists and their supporters (the plaintiffs) by two state judicial officers was alleged. The District Court dismissed the suit for lack of jurisdiction, and, after the dismissal was reversed on appeal, certiorari was granted by this Court. This Court

ruled that the action was properly dismissed as to the judicial officers for two reasons, one of which was failure "to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of the federal courts must allege an actual case or controversy." Noting that the complaints alleged injury in only the most general terms and that no plaintiff alleged he himself had suffered specific deprivation of his constitutional rights by the defendants' actions, the Supreme Court said:

> ". . . Nor is the principle different where statutory issues are raised . . . Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the danger of the challenged statute or official conduct . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical' ". (citations omitted) 14 Crim. L. Rptr. at p. 3087.

Although the present complaints are somewhat different from the one dismissed in *O'Shea*, nevertheless, they raise analogous racial discrimination issues and suffer from the same defect of insufficient specification of personal injury incurred as a result of cell assignment practices. To defendants' knowledge, neither plaintiff ever specifically alleged in a complaint or at trial that he had been refused permission to cell with a person of another race or that he had suffered any specific injury from the celling patterns existing at the penitentiary. All of plaintiffs' *specific* instances of personal injury as the result of discrimination involved treatment or jobs but not living arrangements. Far from alleging injury resulting from the penitentiary's alleged segregated housing, plaintiff Miller even testified in court that he had no interest in celling with white inmates (Tr. 78, 88).

The simple assertion that a plaintiff is a black inmate of an institution which allegedly prevents men of different races from living together in the same cell (but not the same cell house) should not be considered enough to fulfill the "real injury" case or controversy requirement of Article III. Such an assertion in the prison context (as opposed to the complicated school situation) raises no question of injury except on the most abstract and hypothetical levels. See decision of the Supreme Court in the analogous case of *S.* v. *D.* —— U.S. —— 93 S. Ct. 1146 (1973).

Inmates of all races did associate and continue to associate in all other aspects of prison life. During the years 1966-1968 there was a period of more-or-less forcible integration of cells. The program was apparently dropped because of a threat of racial disturbances. (See *Thomas* v. *Pate*, opinion of the 7th Circuit contained in the Appendix). Such facts obviate any claim that separation of the races in prison cells constitutes a "badge of inferiority" which might automatically amount to an injury that confers standing to sue.

E.

THE DECISION ON REMAND BELOW IS THE RESULT OF A CONTINUING MISCONSTRUCTION OF THIS COURT'S DECISION IN *HAINES* v. *KERNER*.

The Court of Appeals for the Seventh Circuit has misconstrued this Court's mandate in *Haines* v. *Kerner*, 404 U.S. 519, 92 S. Ct. 594, finding that the instant complaint is sufficient to state a constitutional cause action. In their opinion the Court of Appeals stated that:

> "The events described by Thomas' complaint occurred in 1963 and 1964 and had dismissal of his complaint been tested in this circuit at that time, dismissal would

undoubtedly have been affirmed. *Thomas* v. *Pate*, No. 71-1410 slip opinion, March 25, 1975, page 3. (Appendix C).

But the Court of Appeals then went on to hold that the Thomas' allegations, when tested by the "more general due process principles" reflected in *Haines*, should not have been dismissed. *Thomas*, supra, page 4 of slip opinion. The defendants-petitioners, however, contend that this Court did not establish a due process standard for disciplinary proceedings in *Haines;* rather that case merely sought to clarify the question of when a complaint was sufficient to state a couse of action.[4]

The Court of Appeals' interpretation of *Haines*, if carried to its logical extension, would mean that *no* prisoner complaint based on due process claims prior to *Wolff* or *Miller* could be dismissed without a hearing, even though under the applicable legal standard plaintiff would not be entitled to judgment under any set of facts likely to flow from his complaint. The petitioners submit that this is a misapplication of this Court's holding in *Haines*, and that complaints, including the instant one, may properly be dismissed if they fail to state a constitutional cause of action determined by the due process standards applicable when claims first arose.

A statement is needed from this Court to clarify the mistaken interpretation of *Haines* followed by several lower federal courts.

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4. *Miller* v. *Twomey*, 479 F. 2d 701 (7th Cir. 1973).

F.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE INSTANT COMPLAINT STATED A CONSTITUTIONAL CAUSE OF ACTION FOR DENIAL OF DUE PROCESS IN 1963-'66 DISCIPLINARY INCIDENTS.

The Court of Appeals for the Seventh Circuit through their misconception of this Court's holding in *Haines* v. *Kerner*, 404 U.S. 519 (1972), erroneously decided that the instant complaint stated a constitutional cause of action. The defendants-petitioners contend that a proper application of the due process standards relevant at the time these claims arose aptly demonstrates that the present complaint does not rise to the constitutional level.

The *Thomas* Complaint, although written *pro se* and difficult to follow at points, does describe several specific occasions on which plaintiff was disciplined by prison officials during the period of 1963 to 1966. In every instance except one, plaintiff stated that he was taken before at least one "disciplinarian" who related the charges to him, and allowed him an opportunity to defend himself (Complaint, pages 6 through 12).

On the one occasion in 1964, when plaintiff alleges that he was punished without being advised of the reasons, his confinement lasted only three days and was apparently *not* under difficult conditions. Consequently, the 3-day close confinement in 1964 does not constitute a serious enough punishment or loss of liberty to rise to the level of a constitutional problem. *LaBatt* v. *Twomey*, 513 F. 2d 641 (7th Cir. 1975).

In all the other instances of discipline, plaintiff-respondent does not state that the punishments applied were totally arbitrary or unjustified. In fact, his only complaint stems from the "adequacy" of the reasons and explana-

tions given for the punishments. But in all of these situations, prison officials supplied the plaintiff with the reasons for their orders of confinement or subsequent dispositions. (e.g., fighting, Complaint, p. 5; strong-arming other inmates, C. p. 6; stealing, C. p. 8; yelling, C. p. 8; climbing the water tower twice, C. pp. 9-11).

The instant complaint must be viewed in the time perspective in which its claims first arose. At that time there was no announced due process standard for disciplinary proceedings.[5] The federal courts were then following the "hands off" doctrine regarding all matters of prison discipline, except in those instances where prison officials had acted with sheer arbitrariness in punishing an inmate. This same position was embraced by the Court of Appeals for the Seventh Circuit, and resulted in the admonitions to all inmates concerning their attempts to review prison discipline in federal suits under 42 U.S.C. § 1983. *Walker* v *Pate*, 356 F. 2d 502 (7th Cir. 1966).

Thus, if Thomas' allegations are examined in light of the due process standards as applied to their relative time periods, it is clear that these claims have no merit under § 1983. Because every confinement of Thomas to isolation or segregation for a significant length of time was accompanied by a plausible reason and was not totally arbitrary *according to his own complaint*, each of his discip-

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5. In fact it wasn't until this Court's recent decision in *Wolff* v. *McDonnel*, 418 U.S. 539, 94 S. Ct. 2963 (1974), that any real standard was uniformly applied throughout the circuits.

linary due process claims from 1963-'66 fails to state a constitutional cause of action and warrants dismissal under *Walker* v. *Pate*, supra.[6]

CONCLUSION

For the foregoing reasons, the petitioner requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,
JAMES B. ZAGEL,
MELBOURNE A. NOEL, JR.,*
Assistant Attorneys General,
188 West Randolph Street (Suite 2200),
Chicago, Illinois 60601,
(312) 793-2570,

Counsel for Petitioners.

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6. The one allegation in the Thomas Complaint that he was beaten by officials wielding blackjacks after he responded to charges, involves an Eighth Amendment rather than a due process claim. The defendants have never challenged that this particular issue should be incorporated into section "4(b)" of the Court of Appeals, Seventh Circuit, January 10 Opinion. 493 F. 2d 151 (1974), (See Appendix A).

* Mr. Noel was assisted in the preparation of this Petition by John R. Doyle, senior law student at DePaul University, School of Law.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1972 — September Session, 1972

No. 71-1410
CHARLES THOMAS,
Plaintiff-Appellant,
vs.
WARDEN FRANK J. PATE, HERBERT BROWN, Dir., Dept. of Public Safety, and HOLLIS W. McKNIGHT, Supt. of Persons, Dept. of Public Safety,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Richard B. Austin,
Judge.
69 C 609

No. 71-1411
LUTHER W. MILLER,
Plaintiff-Appellant,
vs.
ILLINOIS DEPT. OF CORRECTION, ILLINOIS STATE PENITENTIARY, WARDEN FRANK J. PATE,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Richard B. Austin,
Judge.
69 C 761
70 C 21

Argued October 26, 1972 — Decided January 10, 1974

Before FAIRCHILD, *Circuit Judge,* KILKENNY, *Senior Circuit Judge,** and STEVENS, *Circuit Judge.*

* Senior Circuit Judge John F. Kilkenny, of the Ninth Circuit, is sitting by designation .

FAIRCHILD, *Circuit Judge*. Plaintiffs Thomas and Miller are black inmates incarcerated in the Illinois State Penitentiary at Joliet, Illinois. They appeal from a judgment entered in favor of defendant prison officials in three consolidated actions. These suits were brought under 42 U.S.C. § 1983 seeking injunctive and monetary relief for alleged violations of plaintiffs' civil rights. Plaintiffs assert that prisoners are housed in racially segregated cells; that because of their race, black prisoners are afforded less desirable job and educational opportunities than other prisoners; that conditions in the disciplinary cells constitute cruel and unusual punishment; that plaintiff Thomas was denied procedural due process in intra-prison disciplinary proceedings; that plaintiff Thomas was punished for his refusal to admit guilt; that plaintiff Thomas was denied proper medical care; that plaintiff Thomas was denied reasonable access to the courts; and that defendants violated the equal protection clause by their method of distributing underwear to prisoners.

On appeal, plaintiffs argue that they were denied a fair hearing by the district court's refusal to permit them to address the court directly despite plaintiffs' express dissatisfaction with court-appointed counsel;[1] that the district court erred in finding there is no racial discrimination at the prison; and that the district court should not have dismissed various portions of the Thomas complaint for failure to state a claim upon which relief can be granted.

It appears from the complaints that plaintiffs attempted to bring these actions on behalf of a class consisting of

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1. New counsel appear on this appeal.

all black inmates incarcerated in the prison. The district judge found that plaintiffs are not representative of any group of prisoners confined in the prison. We do not review the appropriateness of this finding because plaintiffs have not raised this issue on appeal.

1. *Racial Discrimination in Composition of Cells.*

The racial composition of the prison at the time of trial was 60.2% black and 39.8% Caucasian and other minorities. The general population is housed in one-man, three-men, six-men, and twelve-men cells; prisoners confined in punitive status are housed in twelve-men cells.

Each cell-block houses a racially mixed population of prisoners. However, the uncontradicted testimony of plaintiffs reveals that it is and has been in the past extremely unusual for a black prisoner to share a cell with a Caucasian or a prisoner of another race. Cellhouse charts maintained by prison officials record the racial composition of each cell, but were not introduced at trial.

Unfortunately, the paucity of evidence in the present record with regard to prison policies governing cell assignments for incoming prisoners and prisoners' cell transfer requests precludes us from determining whether the existing condition of segregation is attributable to the state so that violation of the equal protection clause of the fourteenth amendment is demonstrable. *Comment, School Desegregation After Swann: A Theory of Government Responsibility*, 39 U. Chi. L. Rev. 421 (1972).

The evidence is insufficient to determine without speculation whether cell assignments of new inmates prior to 1966 were made without regard to race or were designed to preserve racially homogeneous cells. Mr. Shea, a prison official, testified that the first attempt affirmatively to cre-

ate racially balanced cells by considering race in assigning new inmates occurred about 1966. The only other relevant evidence is defendants' ambiguous admission in the amended and reinstated answer that at "various times in the past," incoming inmates have been assigned cellmates by "considering racial characteristics among others."

It is also not clear whether prior to 1966 the prison honored a request of an inmate to transfer from a cell in which all the occupants were members of his race to a cell housing inmates of other races. Testimony of Mr. Shea on transfer policies relates to time periods subsequent to 1966. Plaintiff Thomas submitted a verified document containing a conclusory allegation that requests to transfer are routinely denied.

Mr. Shea's uncontradicted testimony indicates that between 1966 and 1968, prison officials considered race in assigning cells to incoming inmates in order to obtain racially balanced cells.[2] No statistics have been introduced to indicate the extent of this effort or the proportion of inmates presently incarcerated who were affected by this policy damage.

During this p eriod, prison officials attempted to discourage prisoners from transferring in order to avoid living in racially integrated cells. There is, however, no evidence indicating the number of prisoners who insisted upon transferring to racially segregated cells. It does not appear that defendants adopted a program of reassigning prisoners placed in segregated cells prior to 1966, and continuing therein.

The record is uninformative about prison practices with respect to assignment and transfer subsequent to 1968.

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2. Genuine indifference to race is the ideal, but consideration of race for the real purpose of correcting past discrimination is not in itself unconstitutional.

Mr. Shea indicated that because of an incident within the prison at the time that Dr. Martin Luther King died, the authorities became more reluctant to interfere with prisoners' choices of cellmates. There is no testimony as to whether the policy at the time of trial was to ignore race in assigning incoming inmates to cells or whether race was considered either with the objective of maintaining racially segregated or racially balanced cells. Transfer policies are not clearly revealed.

In *Lee* v. *Washington*, 393 U.S. 333 (1968), the Supreme Court affirmed the order of a three judge district court declaring that Alabama statutes requiring racial segregation in prisons are unconstitutional and establishing a schedule for desegregation. In *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972), the Court cited *Lee* for the principle that "racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline.' " See also, *United States* v. *Wyandotte County, Kansas*, 480 F. 2d 969 (10th Cir., 1973).

Assuming (although we have noted that it is not clear) that recent policy has not tended to produce racial segregation, there would remain a question of the extent of the duty of defendants to remedy segregation which is a residue of pre-1966 policy, if unlawful.

In instances involving past *de jure* segregation in schools, the authorities have an affirmative obligation to dismantle the former system. See *Swann* v. *Board of Education*, 402 U.S. 1 (1970), *reh. denied* 403 U.S. 912; *Green* v. *New Kent County School Board*, 391 U.S. 430 (1968); *Keyes* v. *School*

District No. 1, Denver, Colorado, 413 U.S. 189, 220-23 (1973) (Powell, J., concurring).

It is our opinion that a similar affirmative duty applies with respect to a past practice of racial segregation in a prison. Although there may be relevant differences between the prison and school situations in terms of risk and racial conflict, potential for violence, and compelled proximity between individuals, and between the rehabilitative and educational purposes served, the principle that intentional segregation is unlawful yields only to "the necessities of prison security and discipline." *Lee,* and *Cruz, supra.* We think the corollary that there is an affirmative duty to remedy past unlawful practice would yield only to similarly compelling interests.

It cannot be determined from the record in this case whether some of the prisoners, for example, those remaining in cells assigned prior to 1966, were there as the result of policies pursued under color of law, or, in other words, of *de jure* segregation similar to that declared unconstitutional in *Lee* v. *Washington, supra.*

Assuming the affirmative, defendants must show that they satisfied the affirmative duty to remedy the past practice. In practical terms, they may find it necessary to establish that they have effectuated some degree of actual integration in the prison; for any showing other than the objective fact of actual integration at the present is unlikely to persuade either the members of the prison community or the courts that prison officials have abandoned unconstitutional prior practices of compulsory racial segregation. See *Hobson* v. *Hansen,* 269 F. Supp. 401, 494-95 (D.C., 1967), *appeal dismissed,* 393 U.S. 801. But see *Boyd* v. *Pointe Coupee Parish School Board,* 332 F. Supp. 994 (E.D. La., 1971). Once again the paucity of evidence in the record precludes us from resolving these issues.

The record establishes that at the time of the commencement of this action, there was virtually complete separation of inmates according to race in cells of the prison. As we have noted, it has not been demonstrated whether the existing condition of racial separation is the result of intentional segregative policies of prison authorities or whether it stems from the interaction of otherwise permissible, racially neutral policies with social conditions for which prison authorities are not responsible. Under these circumstances, the question is whether plaintiffs have established a *prima facie* case, shifting the burden of proof to defendants.

The district court, in finding adversely to plaintiffs, apparently concluded that plaintiffs' burden extended beyond establishing an existing condition of racial separation.

We recognize that in *Keyes, supra,* the Supreme Court indicated that plaintiffs must establish more than an existing condition of racial separation in a school system before the burden is shifted to school authorities to produce evidence that the condition is not chargeable to the state. In addition, some showing must be made of a pattern of past or present intentional segregation. *Keyes, supra,* at 209-10.

We are not bound to apply the allocation of proof developed in *Keyes* in prison segregation cases. The Supreme Court in *Keyes* emphasized that "[t]here are no hard and fast standards governing the allocation of the burden of proof in every situation" and that instead allocation of proof questions should be resolved as a matter of "policy and fairness based on different situations. IX Wigmore, Evidence § 2486 (3d Ed. 1940)." Its conclusions with respect to allocation of proof are limited explicitly to "the context of racial segregation in public education." *Keyes, supra,* at 209.

In the prison context, as contrasted with the public schools, we think there is a higher probability that a pervasive pattern of racial segregation in cell occupancy is attributable to intentionally segregative actions for which prison officials are constitutionally accountable. Moreover, it is more difficult for prisons to obtain and present evidence relevant to segregative intent of prison authorities than for persons challenging segregation in the public schools.

For these reasons we conclude that the burden shifts to the defendant prison authorities once the plaintiffs have demonstrated an existing condition of racial separation in prison cells and that the district court erred in finding adversely to plaintiffs on the basis of their failure to prove the ultimate fact.

2. *Racial Discrimination in Work Assignments*

The district court found that plaintiffs failed to demonstrate that prison officials discriminate against black inmates in making work assignments. We conclude that this finding is not clearly erroneous.

Plaintiffs contend that menial porter and cleaning jobs are performed by black inmates, while white inmates are assigned more desirable clerical positions. Mr. Shea testified, however, that job assignments are made by considering an inmate's educational level, his ability and skills, his other job experiences in the prison, his prison "seniority" (the length of time spent in prison), and his disciplinary record. He further testified that race is considered only in attempting to maintain a racial balance in all jobs.[5] The only statistics introduced as to racial distribution of jobs do not indicate a pattern of racial discrimination. We note

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5. Cf. fn. 2, *supra*.

that plaintiff Thomas testified that he is satisfied with his job in the furniture shop. Plaintiff Miller complains about his inability to attend "TV College"; however, he was informed that his requests were denied because of his lack of seniority and his disciplinary record, and he is not certain himself whether the denial was based upon his race.

3. *Plaintiffs' Opportunity to be Heard.*

Plaintiffs urge that they were denied a fair opportunity to be heard by the district court's refusal to permit them to speak for themselves after they had informed the court about their dissatisfaction with appointed counsel. Specifically, plaintiffs claim that it was error not to permit plaintiff Thomas to "assist" his attorney by cross-examining one of the defense witnesses and by summarizing applicable law. Plaintiffs also bring to our attention the district judge's denial of Miller's request to file an amended petition and of Thomas' request to supplement his testimony. These latter rulings do not appear to have involved error or abuse of discretion. In any event, the rulings were not affected by the relationship between plaintiffs and their attorneys.

A plaintiff in a civil action, as contrasted with a defendant in a criminal prosecution, has no sixth amendment constitutional right to competent counsel. Nonetheless, plaintiffs in a civil proceeding, whether appearing *pro se* or represented by counsel, must be afforded a fair opportunity to present their case. We conclude that plaintiffs have been afforded such an opportunity here. Our review of the record indicates that plaintiffs' counsel were not incom-

petent, when tested by the standard of competency required of attorneys in criminal actions;[6] that the district judge clearly informed plaintiffs that they must rely upon their counsel, when so represented, to present their case; that plaintiffs never requested that their court-appointed counsel be dismissed; and that in fact the district judge provided plaintiffs with considerable leeway in addressing the court directly.[7]

4. *The Failure of the Thomas Complaint to State Claims.*

The district court dismissed several portions of plaintiff Thomas' *pro se* complaint, prior to the appointment of counsel for Thomas, on the ground that the allegations failed to state claims upon which relief can be granted. The question is whether, accepting any factual allegations as true, "it appears 'beyond doubt that plaintiff can prove no set of facts in support of his claim[s] which would en-

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6. In a criminal proceeding the question is whether the incompetence of counsel turned the trial into a "sham or mockery" or at least "blotted out the essence of a substantial defense." *United States ex rel. Little* v. *Twomey*, 477 F. 2d 767, 773 (7th Cir., 1973); *Scott* v. *United States*, 427 F. 2d 609, 610 (D.C. Cir., 1970). The standard followed in the third circuit is "whether counsel's performance was at the level of normal competency", *i.e.*, "the exercise of the customary skill and knowledge which normally prevails at the time and place." *Moore* v. *United States*, 432 F. 2d 730, 736-7 (3rd Cir., 1970); *United States* v. *Hines*, 470 F. 2d 225, 231 (3rd Cir., 1972). That formulation has not been adopted in this circuit.

7. Testimony was also taken with respect to Thomas' claim of a beating on December 29, 1966. The court's finding adverse to Thomas has not been challenged on appeal.

title him to relief' " (citation omitted). *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972). We proceed to consider each of these portions.

(a) *Medical Treatment.*

On appeal Thomas asserts that the court erred in dismissing his allegations concerning medical treatment. We note that the district court did not dismiss his allegation that black inmates receive lower quality medical treatment than white inmates. No evidence, however, was introduced on this issue at trial.

It is well established as a general principle that prison officials are vested with broad discretion in determining the nature and character of medical treatment afforded to state prisoners. *Henderson* v. *Pate*, 409 F. 2d 507, 508 (7th Cir., 1969), *cert. denied*, 396 U.S. 914; *United States* v. *Ragen*, 323 F. 2d 410, 412 (7th Cir., 1963). Courts have had difficulty in particular cases, however, in determining whether a prisoner plaintiff has stated a claim of deprivation of a federal constitutional right.

Such a claim is not stated where plaintiff alleges no more than that he is dissatisfied as to the adequacy of treatment actually received for a particular injury or ailment. *Henderson*, *supra*, at 508. Courts will not attempt to second-guess licensed physicians as to the propriety of a particular course of medical treatment for a given prisoner-patient. See *Cates* v. *Ciccone*, 422 F. 2d 926, 928 (8th Cir., 1970).

On the other hand, a claim of medical mistreatment rises to fourteenth amendment proportions when it asserts a refusal to provide essential medical care after a prisoner brings his medical complaint to the attention of prison authorities. (In the instant case we are not confronted

with and do not express an opinion about whether the constitution requires prisons to provide preventive medical services not requested by inmates, *e.g.*, regular physical examinations.) In the ultimate determination whether medical care was in fact essential, the question would be, we think, whether it had been proved that a physician exercising ordinary skill and care at the time of the request for medical care would have concluded that the symptoms of the prisoner evidenced a serious disease or injury; that the potential for harm by reason of delay or denial of medical care was substantial; and that such harm did result. In deciding at the pleading stage whether a claim has been stated, the court must consider whether the factual allegations of the complaint suggest the presence of these factors. See *Stiltner* v. *Rhay*, 371 F. 2d 420, 421, n. 3 (9th Cir., 1967), *cert. denied*, 386 U.S. 997, *reh. denied*, 389 U.S. 893; *Coleman* v. *Johnston*, 247 F. 2d 273 (7th Cir., 1957).

We also think that it is sufficient to allege facts which suggest that the medical care provided is so clearly inadequate as to amount to a refusal to provide essential care or is so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition. See generally *Cates* v. *Ciccone*, 422 F. 2d 926 (8th Cir., 1970); *Mayfield* v. *Craven*, 299 F. Supp. 1111, 1113 (E.D. Cal., 1969).

Turning to the complaint at bar, plaintiff Thomas first complains of the medical treatment afforded for an ear wound. He alleges that although his medical record reveals that he is allergic to penicillin and although he brought this information to the attention of the medical staff, the inmate nurse gave him a shot of penicillin. He further alleges that when he subsequently had an allergic reaction

to the penicillin, the prison doctor, without examining him, concluded that no further treatment was needed. He also claims that he was placed in unsanitary punitive confinement while sutures were in his ear, that the date of removal of the sutures was delayed for the period of punitive confinement (fifteen days at a maximum), and that the result of this treatment was that his ear became infected. He acknowledges that this infection was subsequently treated.

We conclude that Thomas' allegations concerning the administration of penicillin despite his known allergy to that drug and the allegations describing intentional delay in removing sutures while he was confined in unsanitary environs suffice to state claims for relief for intentional mistreatment likely to aggravate his condition. The district court erred in dismissing this portion of the complaint.

Thomas complains about the content of his meals which he alleges are 75% beans. He claims that he is allergic to beans; that he has informed prison authorities about this allergy; that his requests for alternative meals have been denied; and that he has been denied medical treatment for his skin condition resulting from eating beans.

We conclude that the district court should have required defendants to answer Thomas' claim that prison authorities knowingly required him to choose between not eating at all or eating beans. Furthermore, his allegations concerning the refusal of the defendants to provide any medical treatment for his resulting skin condition should not have been dismissed.

Finally, Thomas alleges that while confined in segregation, he began vomiting blood. He claims that despite his appeals for help, a doctor did not arrive for two hours. When he did arrive, the doctor prescribed medicine, but

would not X-ray plaintiff's chest. (Thomas had a chest X-ray the previous year.)

We conclude that the district court properly held that the allegations describing the vomiting incident fail to state a claim upon which relief can be granted. There is no allegation that the delay in receiving medical treatment resulted in substantial harm. The difference of opinion between the doctor and prisoner-patient about the necessity for an X-ray is not of constitutional proportions.

(b) *Inhumane Conditions in Punitive Confinement.*

Thomas alleges that the punitive segregation units are foul-smelling, filthy, overcrowded, infested with insects and rodents, and inadequately lighted, heated and ventilated; more particularly that he was confined in cells housing ten to eleven prisoners with dimensions of twenty-one feet by ten feet; that the cell floors are made of rough, cold, and damp concrete; that the cells have no hot water and only one toilet; that in winter it is so cold that ice forms on the cell's inner walls; that there are "roaches, ticks, millipedes, spiders, silverfish, centipedes, louses, and mice" in the cells; that each inmate is provided with one pair of pants, one shirt, one pair of thin cloth slippers, and four filthy blankets which are never washed; that only one meal per day is provided; that no exercise facilities are provided; and that the cell is enclosed by both a steel gate door and a wooden door, shutting out air and light.

Adams v. *Pate,* 445 F. 2d 105 (7th Cir., 1971), decided appeals in two actions, one of which was brought by Miller, a plaintiff in the instant action. There we considered the conditions in disciplinary cells in the same penitentiary. We affirmed the dismissal of each complaint. It was held that Adams' claim was properly dismissed because the

complaint contained only general conclusory allegations, unaccompanied by specific averments. Miller failed to state a claim because he did not allege "conditions 'so foul, so inhuman and so violative of basic concepts of decency' to fall within the proscriptions of the Eight Amendment. (citations omitted)" *Adams* v. *Pate, supra,* at 109. It appears that neither case was maintained as a class action. Depending upon whether the order of the district court in Miller's case specified that the dismissal was without prejudice, Miller may be barred by *res judicata* in the instant case from claiming that the conditions in disciplinary confinement are unconstitutional. See *Rinehart* v. *Locke,* 454 F. 2d 313, 314 (7th Cir., 1971); 1B Moore's Federal Practice ¶ 0.409[1], pp. 1006-1007.

Here, however, the detailed allegations or cruel and unusual punishment appear also in the complaint of plaintiff Thomas, who was not a party to either action in *Adams* v. *Pate.* The action of the district court below consolidating Thomas' action with that of Miller, pursuant to Rule 42, F. R. Civ. P., does not deprive Thomas of his right to "a day in court" on this issue.

Adams v. *Pate* is distinguishable from the instant case in that the complaints there did not allege with specificity all of the conditions described in the complaint here; Adams alleged only that the segregation unit was "unsanitary"; Miller did not specify the number of prisoners confined in each cell, nor did he describe the ice on the interior cell walls, the insects and rodents in the cells, the absence of hot water, the inadequate clothing and filthy blankets, and the lack of proper food and exercise.

We do not attempt to determine here what specific conditions, if proved, would be sufficient when viewed in their entirety, to entitle Thomas to relief for violation of his

eighth amendment rights. It suffices to conclude, as we do, that it cannot be said that Thomas can prove no set of facts in support of his claim which would establish that living conditions in disciplinary cells are so foul, inhumane, and violative of basic concepts of decency as to constitute cruel and unusual punishment. See *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972).

(c) *Denial of Release from Segregation until*

The complaint describes two instances in which Thomas' release from segregation into the general population was conditioned upon his agreeing to write letters to prison officials. The requested content of these letters is not alleged. Thomas argues that making the extent of punitive confinement depend on admission of misconduct is a deprivation of rights.

Thomas relies upon cases holding that persons convicted of crimes may not be subjected to harsher punishment because of their refusal to plead guilty and to waive trial, *e.g.*, *United States* v. *Wiley*, 278 F. 2d 500 (7th Cir., 1960). Even accepting the assertion that this principle applies with equal force to prison disciplinary proceedings, we think it inapposite here. There is no claim that the length of Thomas' confinement was extended by refusal prior to determination of guilt to waive rights to procedural due process or to admit that he had committed a rule infraction.

Instead, at most, it is alleged that prison officials considered Thomas' refusal to admit his misconduct subsequent to the determination of his guilt. We are not aware of nor has he cited any authority for the proposition that it is unconstitutional or an abuse of discretion for a judge, in sentencing, to consider whether the defendant accepts responsibility for his criminal acts following the return of the guilty verdict.

We conclude that the district court properly dismissed these allegations.

(e) *Due Process in Disciplinary Proceedings.*

Thomas argues that the district court erred in dismissing his allegations of denial of procedural due process in disciplinary proceedings. Although the *pro se* complaint and supplement thereto do contain numerous recitations about Thomas' incarceration in disciplinary cells at various times for infractions which he allegedly did not commit, it contains few affirmative allegations describing the disciplinary proceedings preceding these punishments. We cannot presume simply from the absence of such allegations that procedural due process was not afforded. Moreover, the district court properly dismissed Thomas' conclusory and general allegations that conduct reports filed by officers are presumed to be correct and that there is a practice of punishing black inmates on the basis of secret incriminatory notes written by white inmates.

The complaint does contain some specific allegations which deserve closer consideration. Thomas alleges that following an incident in 1963, he was interviewed by a "mob" of prison officials and was subject to oral and physical harassment when he asked to be confronted with the accusing officer and complaining witnesses. He was sentenced to ten days in isolation. Thomas further alleges that in 1964 he was punished without being informed of the charges against him; he was placed in isolation for three days. The complaint describes another incident when he attempted to explain to the prison "disciplinarian" that conduct reports were being filed against him because of his pending lawsuits. He claims that he was attacked by officials wielding blackjacks. Thomas' complaint at least suggests that as a result of this incident and ensuing events,

he was confined in isolation for fifteen days and deprived of six months of statutory good time.

In *Miller* v. *Twomey*, 479 F. 2d 701, 718 (7th Cir., 1973), this court held that in any case involving a "grievous loss", a prisoner is entitled at least to adequate and timely written notice of the charge, a fair opportunity to have witnesses called or interviewed, a fair opportunity to explain, and an impartial tribunal. Thomas' complaint adequately alleges deficiencies in the disciplinary proceedings described above, when measured against these minima.

The question remaining is whether the punishment imposed was sufficiently severe to bring the due process requirement into play. We recognize that prisoners in the general population live without many of the amenities and freedoms taken for granted outside prison walls. But confinement in isolation often entails deprivation of remaining valued rights and privileges enjoyed by inmates in the general population.

The alleged deprivation of statutory good time and punitive confinement for fifteen days clearly constitute a "grievous loss." *Miller, supra,* at 715; *Knell* v. *Bensinger,* ——F. 2d——. Slip opinion, p. 6 (No. 72-1271, 72-1788, November 6, 1973).

In order to determine whether confinement in isolation for three days or ten (each of which is alleged), is sufficiently severe, the conditions of confinement must be scrutinized. See *Miller, supra,* at 717. For present purposes, we must accept as true Thomas' allegations, set out in part 4(b) of this opinion, concerning the conditions of confinement. We conclude that a prisoner so confined for three days or more (and possibly for fewer) suffers a "grievous loss."

Furthermore, no extraordinary circumstances have been alleged which indicate a need for "prompt decisive action" by the state, *Miller, supra,* at 717.

Accordingly, the district court erred in dismissing these specific allegations concerning denial of procedural due process in disciplinary proceedings.[8]

(e) *Denial of Access to the Court.*

Thomas argues that he stated a claim by alleging that prison officials confiscated his legal materials intended for the courts and refused to mail his letters to attorneys. In addition, Thomas brings to our attention his allegations regarding postage.

Several of these allegations were contained in documents filed with the district court prior to entry of the order granting defendants' motion to dismiss; we consider these allegations first. The complaint and the accompanying "supplement" do not allege with particularity any incident when officials confiscated or refused to mail letters or legal documents.

Thomas alleges that he was required to pay an amount of postage which in fact he could afford; but that inmates confined in other Illinois prisons do not have to pay postage. This fails to state a claim for denial of reasonable access to the courts since Thomas could afford to pay the postage for his documents. Furthermore, even when liberally construed, Thomas' complaint fails to state a claim

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8. Thomas' complaint, assuming ultimate favorable findings, would be a predicate for injunctive relief, which he seeks. See *Adams* v. *Carlson,* ——F. 2d——, Slip Opinion, p. 15 (No. 73-1268, August 23, 1973) He also asks damages. It would be inappropriate to apply *Miller* retroactively so as to award damages against the defendants for past failure to comply with *Miller,* if their acts were in good faith. See *Miller, supra,* p. 719, n. 38.

under the equal protection clause. He has not alleged whether the other prisons providing inmates with postage are maximum, medium, or minimum security institutions, nor whether earnings or allowances are comparable. It may be that free postage is offered only to those in a class which is distinguishable from Thomas' on a rational basis.

Thomas further alleges that he was told by a prison official that he must provide a copy of a legal document to the warden before it would be mailed to the court. The outcome is not alleged, nor is there a claim that the requirement reflects a general policy at the prison. Failure to address this claim in argument indicates that it is not seriously pressed, and we do not reach it.

After the entry of the order dismissing in part the original complaint, Thomas filed a second complaint entitled "complaint for relief for injuries of suppression." This document contains the allegations that particular legal papers were confiscated and not mailed.

Under Rule 15(a), F. R. Civ. P., a party may amend its pleading once as a matter of course prior to service of a responsive pleading. In this circuit, a motion to dismiss is not such a responsive pleading. *Fuhrer* v. *Fuhrer*, 292 F. 2d 140, 141-42 (7th Cir., 1961). Accordingly, Thomas then had the right to amend his original complaint without leave and the allegations in the "complaint . . . for suppression" should have been considered as a part of his pleadings. From the failure of plaintiffs to attempt to adduce evidence in support of these allegations at trial and from the failure of defendants to file a responsive pleading as required under Rule 15(a), it appears that this amendment to the pleading was overlooked. On remand, the district court should establish an orderly procedure permitting defendants to respond to the "complaint for relief of injuries of suppression."

(f) *State-Furnished Apparel.*

Plaintiff Thomas alleges that inmates at the prison who are under forty are not given free long underwear, while inmates over forty, as well as inmates of any age at other Illinois prisons, are supplied with free long underwear. We cannot say that the differences in treatment between older and younger inmates within the prison are arbitrary. Furthermore, Thomas has not alleged whether the other prisons providing free long underwear to all prisoners are maximum, medium, or minimum security institutions nor whether at the other prisons, a prisoner's earnings or allowances are comparable. It may be that free long underwear is made available only to a class which is distinguishable on a rational basis. Also, physical conditions in the other prisons may be different, so that inmates confined therein have a greater need for long underwear. We conclude that Thomas' general allegation does not raise a constitutional claim.

5. *Summary.*

Plaintiffs are entitled to a new trial of the issues dealt with in part 1 of this opinion. The complaint of Thomas is to be reinstated with respect to the claims determined to have been erroneously dismissed in parts 4(a), (b), and (d) of this opinion, and further proceedings should be had on those claims. As indicated in part 4(e) of this opinion, a supplementary complaint of Thomas appears to have been overlooked. It should be deemed an amendment properly before the court, and further proceedings had accordingly.

The judgment appealed from is reversed and the causes remanded for further proceedings consistent with this opinion.

KILKENNY, *Senior Circuit Judge,* Concurring and Dissenting:

The record, in my opinion, supports the district court's finding that appellants failed to prove an existing pattern of racial segregation or discrimination in connection with prisoner cell assignments. Consequently, I would not disturb that finding. Moreover, I do not believe the Thomas charge relative to appellee's alleged failure to proved adequate medical treatment is sustained by the evidence. In my view, appellee's conduct in this area did not amount to a refusal to provide essential medical care, nor was it so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate appellant's condition.

Otherwise, I fully concur in the majority opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1972 September Session, 1972

No. 71-1410 CHARLES THOMAS, *Plaintiff-Appellant,* vs. WARDEN FRANK J. PATE, HERBERT BROWN, Dir., Dept. of Public Safety, and HOLLIS W. McKNIGHT, Supt. of Persons, Dept. of Public Safety, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Richard B. Austin, *Judge.* 69 C 609
No. 71-1411 LUTHER W. MILLER, *Plaintiff-Appellant,* vs. ILLINOIS DEPT. OF CORRECTION, ILLINOIS STATE PENITENTIARY, WARDEN FRANK J. PATE, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Richard B. Austin, *Judge.* 69 C 761 70 C 21

April 14, 1974

Before FAIRCHILD, *Circuit Judge,* KILKENNY, *Senior Circuit Judge**, and STEVENS, *Circuit Judge.*

*Senior Circuit Judge John F. Kilkenny, of the Ninth Circuit, is sitting by designation.

(*On petition for rehearing.*) In seeking rehearing, defendants rely, with respect to the issue decided in Part I of the opinion, *Racial Discrimination in Composition of Cells,* on *O'Shea* v. *Littleton,* ——U.S.——, 42 L. W. 4139 (Jan. 14, 1974), decided by the Supreme Court after our decision in this case.

Defendants claim that here, as in *O'Shea,* the complaint failed to allege an actual case as controversy with respect to this issue.

The complaints here did allege that the defendants have practiced racial discrimination by requiring plaintiffs to occupy cells with other black inmates and have refused to integrate such cells, thereby depriving plaintiffs of their civil rights and equal protection. We not only treated the complaints as alleging an intentional practice of racial segregation, but concluded that the plaintiffs had established a prima facie case and that the burden shifted to defendants.

Defendants' present point, seeking to rely on *O'Shea,* is that a black inmate's allegation that the prison officers intentionally practice racial segregation in making cell assignments does not fulfill the "real injury," case or controversy, requirement of Article III of the Constitution. They suggest that it is essential for a black inmate specifically to allege that he had been refused permission to cell with a person of another race, or had suffered some other "specific" injury.

In *O'Shea,* plaintiffs were black citizens and white citizens of Cairo, Illinois. The complaint alleged that defendants, a magistrate and judge, were administering the criminal justice system in a racially discriminatory manner with respect to sentencing and other matters. Although some of plaintiffs had formerly been defendants and allegedly

subjected to the discriminatory practices, none was currently so, and "the prospect of future injury rests on the likelihood that [plaintiffs] will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners."

The Court held that "the threat of injury from the alleged course of conduct they attack is simply too remote to satisfy the 'case or controversy' requirement and permit adjudication by a federal court." 42 L. W. at 4142.

We conclude that the *O'Shea* holding does not preclude jurisdiction of a claim by a black inmate of a prison, currently living in a racially segregated cell, that defendant prison officials intentionally maintain racially segregated cells. Placing and keeping him in that cell for that purpose is the present injury which was lacking in *O'Shea*. There is nothing remote about the impact of intentional segregation on plaintiffs, if that policy exists, for they are compelled to live from day to day and night to night in the assigned places.

That there is a present injury to an inmate, intentionally segregated because of his race, is particularly clear if the inmate is black. Because of the relatively small size of the prison community, its closed nature, and the numerous facets of prison life subject to regulation, any racially discriminatory action by prison officials is likely more effectively to create a badge of inferiority for black inmates than would necessarily attach to minority residents of a city as the result of discriminatory action outside prison walls. Indeed, plaintiff Miller's *pro se* complaint explicitly alleged that the maintenance of a segregated institution "foster[s] an atmosphere of racial inferiority . . . to the detriment of the Negro inmate."

Defendants point to certain testimony by Miller and seem to suggest that it refutes his claim of injury. As we read it, the testimony was that it would not make any difference to Miller whether his cellmates were white or black. We do not view this testimony as inconsistent with a claim that he was injured by *enforced* and intentional racial segregation.

Similarly, while the fact that plaintiffs appear not to have made a request to be assigned to an integrated cell may, in the course of trial, have some bearing, negatively, on the proof of the existence of an intentional policy of racial segregation, we think it does not destroy their claim that they are injured by such policy if it is shown to exist.

The petitions for rehearing, both on the part of defendants and of plaintiff Thomas, are denied.

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 71-1410 and 71-1411
CHARLES THOMAS,

Plaintiff-Appellant,

v.

WARDEN FRANK J. PATE, HERBERT BROWN, Director, Department of Public Safety, and HOLLIS W. McKNIGHT, Superintendent of Prisons, Department of Public Safety,

Defendants-Appellees,

and

LUTHER W. MILLER,

Plaintiff-Appellant,

v.

ILLINOIS DEPARTMENT OF CORRECTION, ILLINOIS STATE PENITENTIARY, WARDEN FRANK J. PATE,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division—

Nos. 66 C 609, 69 C 761 and 70 C 21

Richard B. Austin, *Judge.*

ON REMAND FROM THE SUPREME COURT

DECIDED MARCH 25, 1975

Before FAIRCHILD, *Chief Judge,* KILKENNY, *Senior Circuit Judge**, and STEVENS, *Circuit Judge.*

PER CURIAM. Our opinion in this cause, reported at 493 F. 2d 151 (7th Cir. 1974), was issued January 10, 1974. The United States Supreme Court granted certiorari on October 15, 1974, vacated the judgment, and remanded the case "for further consideration in light of *Wolff* v. *McDonnell,* 418 U.S. ——, (pages 31-32 of slip opinion), 1974."opinion), 1974." 43 U.S.L.W. 3206 (October 15, 1974).

The parties to the dispute have been invited to brief the issues presented by the Supreme Court's order. Upon careful consideration of the matter, we conclude that the rationale of *Wolff* can affect only part 4(d) of the original opinion, title "Due Process in Disciplinary Proceedings," and set forth at 493 F. 2d 160-161.[1]

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* Senior Circuit Judge John F. Kilkenny of the Ninth Circuit Court of Appeals is sitting by designation.

1. The defendants suggest that, since they sought certiorari both as to part 1 and part 4(d) of our original opinion and since the Supreme Court denied plaintiffs' petition for rehearing in which plaintiffs asked for modification of the order so as expressly to apply only to part 4(d), we are required to reconsider part 1 as well. We reject this contention. Our reconsideration is directed to be "in light of *Wolff* v. *McDonnell* . . . (pages 31-32 of slip opinion)." The issues discussed in part 1 were not before the Court in *Wolff.*

In that part we summarized Thomas' allegations of denial of procedural due process in disciplinary proceedings and concluded that the district court erred in dismissing them. We relied on the specific due process requirements set out in *Miller* v. *Twomey*, 479 F. 2d 701, 718 (7th Cir. 1973) in determining that Thomas' complaint adequately alleged deficiencies in the disciplinary proceedings against him.

Upon consideration in the light of *Wolff*, we conclude that the specifications in *Miller* are sufficiently detailed to be deemed "new procedural rules affecting inquiries into infractions of prison discipline" and therefore not to be retroactively applied. See *Chapman* v. *Kleindeinst*, No. 74-1218, 7th Cir., December 16, 1974, slip opinion at page 8.

Thus we are now called upon to consider the substance of Thomas' allegations in the light of more general and pre-*Miller* principles of due process as applied to disciplinary proceedings in state penal institutions.

The events described by Thomas occurred in 1963 and 1964 and had dismissal of his complaint been tested in this circuit at that time, dismissal would undoubtedly have been affirmed.

In *United States ex rel. Knight* v. *Ragen*, 337 F. 2d 425, 426 (7th Cir. 1964), this court held that a complaint alleging arbitrary placement by prison officials of an inmate in isolation or confinement did not state a federal cause of action under Civil Rights statutes. It was further asserted that "[e]xcept under exceptional circumstances [such as *Cooper* v. *Pate*, 378 U.S. 546 (1964), where the Supreme Court held that a complaint which alleged petitioner was

being denied privileges enjoyed by other inmates due to his religious beliefs stated a cause of action under the Civil Rights Act], internal matters in state penitentiaries are the sole concern of the states and federal courts will not inquire concerning them. [Citations omitted.]" See also, *United States ex rel. Atterbury* v. *Ragen,* 237 F. 2d 953 (7th Cir. 1956); *United States ex rel. Morris* v. *Radio Station WENR,* 209 F. 2d 105 (7th Cir. 1953).

In a case in which the facts doubtless occurred before 1970, we made a decision similar to that in *Knight, Haines* v. *Kerner,* 427 F. 2d 71 (7th Ciri. 1970). On review, however, the Supreme Court held that *Haines'* complaint alleging in part denial of due process in the steps leading to disciplinary confinement should not have been dismissed. *Haines* v. *Kerner,* 404 U.S. 519 (1972). We are aware of no suggestion that the retroactivity of *Haines* is limited. Indeed in the portion of the Court's opinion in *Wolff* where the state's argument is not included in that 'liberty' protected by the Fourteenth Amendment" was rejected, *Haines* was cited for the sufficiency of a § 1938 complaint where "the state prisoner asserted a 'denial of due process in the steps leading to [disciplinary] confinement'." 42 U.S.L.W. at 5196.

Testing Thomas' allegations by the more general due process principles reflected in *Haines,* we conclude that although the procedures implied in 1963 and 1964 with respect to Thomas are not to be held to the standards of

Miller v. *Twomey*, his complaint should not have been dismissed.[2]

Accordingly, the judgment appealed from is reversed and the causes are remanded for further proceedings consistent with our opinion filed January 10, 1974, except for

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2. The complained of conduct here has, of course, terminated and the complaint contains no clear allegation of continuing illegal activity. Thus, there is no basis for injunctive relief and dismissal would be appropriate if no damages could be awarded. Thomas also seeks damages. *Wood* v. *Strickland*, 43 U.S.L.W. 4293, 4298 (February 25, 1975), while expressly limited to "the specific context of school discipline," represents the Supreme Court's most recent consideration of qualified immunity from damages for public officials in a § 1983 action. If applicable to prison administration, that opinion suggests that, to recover damages, a plaintiff must prove that the defendant has acted within the sphere of his official responsiblity, "with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]" or "with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." Id. Thomas' pro se complaint alleges several instances of unjustified physical beatings in response to requests for notice and an opportunity to respond to disciplinary charges. We believe that applying either the "qualified immunity" standards of *Wood* or those formulated as a "good faith defense" for prison officials in our decisions of *Haines* v. *Kerner*, 492 F. 2d 937, 941 (7th Cir. 1974) and *United States ex rel. Miller* v. *Twomey, supra*, 479 F. 2d at 719, note 39, the existence of those defenses does not sufficiently appear on the face of the complaint to require dismissal. See *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974).

the modifications required by this per curiam opinion.

KILKENNY, *Senior Circuit Judge*, dissenting. I would vacate and remand to the district court for a full fledged hearing in which the court would determine and judicially declare whether appellants' disciplinary rules and regulations, *currently in effect*, meet the four constitutional requirements enunciated in *Wolff* v. *McDonnell*, —— U.S. —— (June 26, 1974). If the court finds that the procedural due process safeguards required by *Wolff* are recognized in the current rules and regulations, the case should be dismissed. Otherwise, the court should direct appellants to amend their practices, rules and regulations to comply with such safeguards.

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Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit